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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CODY JOSEPH LAWSON, Defendant and Appellant.	A143872 (Marin County Super. Ct. No. SC183172A)

Cody Joseph Lawson appeals from an order denying his petition for resentencing under The Safe Neighborhoods and Schools Act (Pen. Code, § 1170.18), commonly known as Proposition 47.[1] Lawson contends (1) the order should be reversed as to his conviction for receiving stolen property, because the prosecution did not prove that the value of the property was more than $950; (2) if the order is reversed and he is resentenced, custody credits should be applied to reduce his period of parole and restitution fines; and (3) the abstract of judgment should be amended so it does not indicate that his conviction for receiving stolen property was a serious felony.

We will affirm the order and direct the trial court to correct the abstract of judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Underlying Proceeding

In February 2013, an Information charged Lawson with three felony counts of residential burglary (§ 459) and one felony count of receiving stolen property (§ 496,

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

subd. (a)). The Information further alleged that the burglary offenses were serious felonies within the meaning of section 1192.7, subdivision (c)(18), and violent and/or serious felonies within the meaning of section 1170.12, subdivisions (a) through (c). The offense targeted by the third burglary count was alleged to be a violent felony within the meaning of section 667.5.

1. Preliminary Hearing

At the preliminary hearing, Officer Alan Bates of the Novato Police Department testified that Sherrie Gutfeld reported a burglary of her home on December 19, 2012. Gutfeld noticed her purse was missing and presents under her Christmas tree had been unwrapped. In the backyard, she found her wallet and purse, which were missing a credit card and cash. The police were dispatched, and as police sergeant Jay Demski approached the house, he observed Lawson and a cohort walking down the street. When the two spotted Demski, they fled, discarding their backpacks. Demski caught up with Lawson trying to scale a fence and asked where the stolen property was; Lawson said it was in the backpack. In Lawson's pocket were Gutfeld's credit card, cash, and jewelry, including three rings.

Officers learned of two other residences Lawson had burglarized. At one of the residences (Kelly), a laptop, jewelry including necklaces and rings, and silver spoons were missing. At the other residence (Crowell), three Apple computers and their keyboards had been taken out of the house and left outside, ostensibly to be retrieved later. The backpacks discarded by Lawson and his associate contained a laptop computer, a power cord, a hat, silverware, jewelry, and two iPads with cases; these items belonged to the Kellys and the Crowells.

2. Plea and Sentencing

In February 2013, Lawson entered a plea of guilty to one felony count of residential burglary and one felony count of receiving stolen property.

In March 2013, the court sentenced Lawson to a term of four years, eight months in state prison, consisting of four years for the burglary plus a consecutive eight months (one-third the middle term) for receiving stolen property.

B. Current Resentencing Proceeding

After Proposition 47 went into effect, Lawson filed a petition under section 1170.18 to have his sentence recalled and to be resentenced on misdemeanors.

On December 5, 2014, the trial court stated on the record that it would review Lawson's petition administratively without a hearing. At this proceeding, the prosecutor was present, but Lawson and his attorney were not. The record does not indicate whether Lawson or his attorney were advised that the petition would be decided without a hearing.

On December 8, 2014, the court issued an order stating that Lawson's petition was "denied." The order did not specify the grounds or reasons for the denial.

This appeal followed.

II. DISCUSSION

A. Resentencing under Proposition 47

Lawson contends the trial court erred in denying his petition for resentencing as to his conviction for receiving stolen property, because Lawson did not have a prior conviction for a serious or violent felony or an offense requiring sex offender registration, there was no evidence in the record of conviction that the value of the stolen property exceeded $950, and there was no evidence that resentencing would pose an unreasonable risk of danger to public safety. The arguments in this appeal focus on whether the court's order can be affirmed on the ground that Lawson did not show that the value of the stolen property was $950 or less.

1. Proposition 47

Proposition 47 reduced certain felony or wobbler drug-related and theft-related offenses to misdemeanors, unless the offenses were committed by ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) As relevant here, Proposition 47 reduced the penalty for receiving stolen property, amending subdivision (a) of section 496 to provide: "if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for [a serious and

violent felony specified in section 667, subdivision (e)(2)(C)(iv)] . . . or for an offense requiring registration [as a sex offender] pursuant to subdivision (c) of Section 290." (§ 496, subd. (a).)

Proposition 47 also created a procedure for offenders "currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense . . . . " (§ 1170.18, subd. (a).) Such an offender "may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing." (§ 1170.18, subd. (a).)

It is the trial court's obligation to determine if the "petitioner satisfies the criteria" for resentencing under Proposition 47. (§ 1170.18, subd. (b).) The petitioner bears the burden of proving that he or she is eligible for resentencing; for the offense of receiving stolen property, this includes a showing that the value of the property involved in the offense did not exceed $950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) "A proper petition could certainly contain at least [petitioner's] testimony about the nature of the items taken. If [the petitioner] made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination." (*Id.* at p. 880; see *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137 (*Perkins)* ["The defendant must attach [to the petition] information or evidence necessary to enable the court to determine eligibility."]; *People v. Johnson* (June 23, 2016, D068384) ___ Cal.App.4th ___ [2016 Cal.App. Lexis 499] (*Johnson*).)

If the court determines that the petitioner satisfies the eligibility requirements in section 1170.18, section (a)—including that the value of the property did not exceed $950—then it "shall" resentence the petitioner to a misdemeanor, "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

On review, we consider the record in the light most favorable to the judgment, accept all reasonable inferences that could be drawn from the evidence in favor of the court's decision, and indulge all intendments and presumptions to support the order on

matters as to which the record is silent. (E.g., *Tesoro del Valle Master Homeowners' Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 635; *Wilson v. Sunshine Meat & Liquor* (1983) 34 Cal.3d 554, 563 (*Wilson*); see *Jackson v. Virginia* (1979) 443 U.S. 307, 326.) We will uphold the order if it may be affirmed on any ground, whether or not the trial court relied on that ground in the order. (*People v. Zapien* (1993) 4 Cal.4th 929, 976; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19.)

2. Value of $950 or Less

Lawson contends he was eligible for resentencing because there "was no evidence in the information, preliminary hearing transcript, or other documents included in the record of conviction that the value of the property exceeded $950." His analysis is incorrect for two reasons: (1) it is Lawson who had the burden of proof; and (2) a reasonable inference from the record is that the property had a value of over $950.

a. Burden of Proof

In the context of a Proposition 47 resentencing petition, it is "entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts upon which his or her eligibility is based." (*Sherow, supra,* 239 Cal.App.4th at p. 880.) Placing the burden on the petitioner to prove the value of the stolen property is not unfair or unreasonable, since he knows what kind of items he took. (*Ibid*. See *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449–450 (*Rivas-Colon*) [petitioner failed to satisfy his burden to establish that the value of the property did not exceed $950, where his petition was " 'devoid of any information about the offense[ ]' " and did not allege that the value of the property was $950 or less]; *Johnson, supra,* 2016 Cal.App.Lexis 499.)

Here, Lawson's petition did not include relevant information about his offense of receiving stolen property or even allege that the value of the property was no more than $950. Nor did Lawson provide any evidence, argument, or authority from which it could be concluded that the property had a value of $950 or less. On its face, the petition did not allege facts sufficient even for a prima facie showing of eligibility for resentencing. It was therefore not error to deny his petition.

In his reply brief, Lawson urges us not to follow *Sherow*, *Rivas-Colon*, or the other cases holding that the petitioner has the burden of proof on eligibility issues under Proposition 47. His arguments are unpersuasive, and we will follow the established precedent of *Sherow* and its progeny.

b. Evidence of Value

At any rate, regardless of who had the burden of proving the value of the stolen property, it would not be unreasonable to conclude from the record that the value of the items in Lawson's possession exceeded $950.

According to the Information, Lawson was in possession of a stolen credit card, laptop computer, charging cord, silverware, jewelry, two iPad tablet computers, and three rings. The preliminary hearing transcript and sentencing report indicate that the stolen property included three Apple computers, as well as a Hewlett Packard computer, two iPads, several items of jewelry including necklaces and rings, "a lot" of silver flatware, and $50 in cash. Lawson provides no authority holding it would be unreasonable to infer that this property was collectively worth over $950.

Lawson nonetheless points us to the concurring opinion in *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), in which Justice Raye opined that the standard of proof for eligibility determinations under Proposition 36 should be clear and convincing evidence. *Bradford* is unhelpful to Lawson, however. In the first place, a concurring opinion has no precedential value. In addition, *Bradford* dealt with an eligibility issue under Proposition 36, not Proposition 47. Lawson fails to convince us that a non-binding concurrence addressing a different statutory scheme should trump multiple appellate precedents that govern the precise issue at hand.

Lawson also points out that the prosecutor did not object to his resentencing petition and, at the "hearing" on December 5, 2014, did not attempt to prove that the value of the stolen property exceeded $950. Although it is true that a prosecutor was present during the calendar call on December 5, the prosecutor was never asked about the People's position on the petition or invited to discuss the value of the property. The reporter's transcript records only that the court announced it would review Lawson's

petition administratively and then dropped the matter from the calendar. And while the record does not contain a written opposition to the petition, this is not a situation where the prosecutor agreed the property's value was under $950 or indicated the resentencing petition was sufficient.

At any rate, it is immaterial whether the prosecutor objected to the petition or opposed resentencing on the ground the stolen property had a value over $950. Regardless of the prosecutor's position, the trial court was obligated to determine if the "petitioner satisfies the criteria" for resentencing. (§ 1170.18, subd. (b).) One of those criteria is that the stolen property must not have had a value of more than $950. (§ 1170.18, subd. (a).) We presume that the trial court knows and applies the law, and therefore that the court made this determination. (*Wilson, supra*, 34 Cal.3d at p. 563.) The absence of any allegation by Lawson of the value of the stolen property supports the inference that the court denied the petition on this threshold ground; and there was no need for the court to hold any hearing to adjudicate disputed issues of fact, since there was no allegation of value to dispute. In any event, we may uphold the court's decision based on any valid ground, whether the court cited it or not. (See *People v. Zapien, supra*, 4 Cal.4th at p. 976.)

In sum, the record supports the denial of Lawson's petition on the ground that he did not allege, much less establish, that the value of the stolen property in his possession was no more than $950. Lawson therefore fails to demonstrate error in the trial court's denial of his resentencing petition.

3. Unreasonable Risk of Danger

Lawson notes that the trial court did not reach the issue of whether resentencing him would pose an unreasonable risk of danger to public safety. (1170.18, subd. (b).) However, because his petition did not establish the value of the stolen property and therefore failed to make even a prima facie showing of *eligibility* for resentencing, there was no need for the court to consider whether resentencing would pose an unreasonable risk of danger. Similarly, the fact that Lawson failed to show that the stolen property had

a value of $950 or less is sufficient for this court to affirm the order, regardless of the issue of dangerousness.

4. Constitutional Rights

Lawson next contends the court's denial of his resentencing petition deprived him of his constitutional rights. We disagree.

a. Meaningful Opportunity to be Heard

Lawson contends the court denied him due process when it "failed to provide him an opportunity to brief or present verbal argument as to any of the potentially contested issues, such as the value of the stolen property or his dangerousness."

As to the value of the stolen property, however, Lawson *did* have an opportunity to brief and present written argument—in his petition. Moreover, there is no indication that if he had been allowed to provide "verbal" (oral) argument on the issue, he would have presented sufficient evidence to sustain his burden of proof, or any evidence that the value of the stolen property was $950 or less.

Lawson notes that rule 4.551(f) of the California Rules of Court provides that "[a]n evidentiary hearing is required if . . . there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact." But here, there is no showing of any reasonable likelihood he may be entitled to relief, because there is no evidence the stolen property had a value of $950 or less.

Lawson also relies on *Bradford*, *supra*, 227 Cal.App.4th at p. 1331, which stated that the "petitioner must be provided an opportunity to be heard before the court determines ineligibility based on unadjudicated facts." Here, however, Lawson had not even *alleged* that the stolen property was valued at $950 or less; there was, therefore, no factual dispute before the court. (*id.* at p. 1340 [no right to a formal hearing is compelled on the threshold issue of eligibility for resentencing consideration in Proposition 36 case].)

As to whether Lawson was entitled to an opportunity to brief or present verbal argument with respect to his dangerousness, we need not decide the issue because the

denial of his petition may be affirmed on his failure to show, as a threshold matter, that the value of the stolen property was less than $950 or less.

b. Hearing on Dangerousness

Under a separate heading, Lawson repeats his contention that he had a due process right to a hearing on dangerousness. Again, because the order denying the petition may be upheld on the ground that he failed to prove the property had a value of $950 or less, neither the trial court nor this court need address the dangerousness issue.

c. Written Statement of Reasons

Section 1170.18 does not require a written statement of reasons when the trial court determines a petitioner is ineligible for resentencing. Lawson nonetheless contends the court should have provided a written statement of the evidence it relied on and its reasons for denying the petition, because the due process clause of the 14th Amendment to the United States Constitution affords a criminal defendant a right to an appellate record that is adequate to permit meaningful appellate review.

Lawson fails to demonstrate that a written statement of evidence and reasons was constitutionally required. In this regard, his reliance on *People v. Vickers* (1972) 8 Cal.3d 451, 457, is misplaced. *Vickers* concerned the due process rights of a probationer at a probation revocation hearing. (*Id*. at p. 453.) Lawson does not establish that this rule should also apply to a determination by the trial court as to the adequacy of a resentencing petition under Proposition 47.

At any rate, the record *is* sufficient for meaningful appellate review in this case. The record contains Lawson's petition, which shows that there was no allegation, evidence, or argument that the stolen property had a value of $950 or less. The record also contains the preliminary hearing transcript, which indicates that the stolen property included four computers and two iPads, as well as jewelry and silver flatware. From this record, we may ascertain whether the evidence was sufficient for a court to conclude that Lawson did not establish the requisite value of the stolen property.

d. Right to Counsel

Lastly, Lawson argues that he was denied his right to counsel under the Sixth Amendment of the United States Constitution because he was not appointed an attorney after he filed his resentencing petition in pro per.

Respondent counters that Lawson has no right to counsel during a resentencing proceeding under section 1170.126. The United States Constitution and the California Constitution grant a criminal defendant the right to assistance of counsel in his defense. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; see *Gideon v. Wainwright* (1963) 372 U.S. 335, 342–343.) This right to counsel "applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake." (*People v. Crayton* (2002) 28 Cal.4th 346, 362.) Sentencing is a critical stage of a criminal proceeding. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) But posttrial motions for sentence *modification or reduction* have been held not to implicate the Sixth Amendment right to counsel. (See *U.S. v. Whitebird* (5th Cir. 1995) 55 F.3d 1007, 1011 [no Sixth Amendment right to counsel in connection with motion for modification of sentence under 18 U.S.C. § 3582(c)(2) because "the constitutional right to counsel extends only through the defendant's first appeal"]; *U.S. v. Nevarez-Diaz* (N.D. Ind. 1986) 648 F.Supp. 1226, 1230 [motion for sentence reduction under Federal Rule of Criminal Procedure 35 "is a post-trial proceeding and, logically, because it is not part of the criminal prosecution, it is outside the scope of the sixth amendment"].) Courts have also declined to extend other Sixth Amendment rights to postconviction resentencing proceedings. (See *Bradford*, *supra*, 227 Cal.App.4th at p. 1336 [holding that a resentencing proceeding under "[s]ection 1170.126, like the statutory mechanism under federal law for a sentencing reduction, is distinguishable from other sentencing proceedings" because the statute "merely provides a limited mechanism within which the trial court may consider a reduction of the sentence below the original term"].)

We need not and do not decide whether Lawson would have had a right to counsel at an actual resentencing if his petition had sufficiently alleged eligibility and proceeded to the resentencing stage. (See *People v. Rouse* (2016) 245 Cal.App.4th 292, 299–301

[where the trial court had granted a resentencing petition and vacated the sentence in its entirety, petitioner had a right to counsel during the ensuing sentencing proceeding, as a matter of due process if not the Sixth Amendment].) Here, Lawson's petition did not make even a prima facie showing of eligibility, and Lawson presents no authority for the proposition that he was entitled to an attorney at this threshold eligibility stage.

Section 1170.18, subdivision (b) provides: "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). *If* the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor" unless the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b). Italics added.) The statute does not contemplate an adversarial process, much less a right to counsel, with respect to the court's initial eligibility determination. (Cf. *Bradford*, *supra*, 227 Cal.App.4th at p. 1337 [a "significant point of contrast between the initial eligibility determination at issue and the subsequent, discretionary decision of whether to resentence a petitioner is the much more summary nature of the initial eligibility determination"].) Lawson does not cite any case holding that a petitioner, who has not alleged facts concerning the value of the stolen property and therefore failed to make even a prima facie showing of eligibility for resentencing, should be appointed counsel. (See *People v. Shipman* (1965) 62 Cal.2d 226, 232–233 [counsel need not be appointed in connection with a writ of coram nobis, in the absence of adequate factual allegations stating a prima facie case].)

In sum, the denial of Lawson's resentencing petition may be upheld on the ground he failed to allege and show that the stolen property in his possession had a value of $950 or less. We will therefore affirm the court's order denying his petition. However, because *Sherow* was decided after Lawson filed his petition, the affirmance will be without prejudice to Lawson filing a new petition that offers evidence of his eligibility. (See *Sherow, supra*, 239 Cal.App.4th at p. 881; *Perkins*, *supra*, 244 Cal.App.4th at p. 142.)

B. Custody Credits

Lawson argues that, if we reverse the trial court's denial of his resentencing petition, we should also "direct the trial court to recalculate Mr. Lawson's period of parole by applying his excess custody to [his] period of parole." He also argues that in the event of resentencing he will have custody credits that should reduce the amount of certain unspecified "fines." Because we do not reverse the trial court's order, however, these issues are immaterial.

C. Abstract of Judgment

Lawson contends the abstract of judgment should be amended such that his conviction for receiving stolen property is not designated as a serious felony. Respondent agrees. (See § 1192.7, subd. (c)(1).)

Although Lawson appeals only from the denial of his resentencing petition, the content of the abstract of judgment is germane to his efforts to obtain resentencing. We have jurisdiction to consider the matter, and, in the interest of judicial efficiency and in light of the parties' stipulation, we will order that the abstract of judgment be amended to show that Lawson's conviction for receiving stolen property is not a serious felony.

III. DISPOSITION

The order denying Lawson's petition for resentencing under Proposition 47 is affirmed. This affirmance is without prejudice to the superior court's consideration of a subsequent petition by Lawson that offers evidence of his eligibility for the requested relief. The abstract of judgment shall be amended such that Lawson's conviction for receiving stolen property is not identified as a serious felony.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A143872)